

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAMELA D. NIRSCHL)	
Claimant)	
VS.)	
)	Docket Nos. 239,167 & 239,168
BAGCRAFT CORPORATION OF AMERICA)	
Respondent)	
AND)	
)	
ROYAL INSURANCE COMPANY OF AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on May 20, 1999.

ISSUES

Respondent denies claimant sustained personal injury by accident arising out of and in the course of claimant's employment with respondent. Respondent argues claimant's condition is instead the result of a prior injury that occurred April 6, 1997 when claimant was involved in an automobile accident. Respondent also disputes the ALJ's finding that claimant is entitled to additional medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes for the reasons stated below that the Administrative Law Judge's Order should be affirmed.

Findings of Fact

1. Claimant was previously injured in an April 6, 1997 automobile accident. She described that injury as being "around my back, around the shoulder blade area towards the middle of my back, up to my neck." Prel. H. Tr. at 9. According to claimant, her pain now is to a different area than the pain she suffered from the automobile accident. But following that accident claimant received treatment that included steroid injections to her shoulder. Claimant was diagnosed as having impingement syndrome and tendinitis. She missed five months of work following the automobile accident.

2. After receiving a full release, without any restrictions, claimant was permitted to return to work for respondent in September of 1997. She worked at both light duty and full duty. Claimant testified she was pain free until October 24, 1997 when she sustained a specific injury to her shoulder. Thereafter her right shoulder symptoms worsened from her job activities. During this time claimant received authorized medical treatment from Dr. John Esch and Dr. Paul W. Toma, who both mentioned surgery as an option.

3. The ALJ sent claimant to Dr. Larry F. Frevert. He felt the cause of claimant's condition was her work activities. But it appears that he was not aware of claimant's prior injury. Furthermore, claimant continued to worsen even after she stopped working for respondent in January of 1998.

4. In April of 1998, claimant was examined by Dr. Esch and Dr. Toma. Neither doctor reported instability in the right shoulder. But when claimant was examined by Dr. Edward J. Prostic in October of 1998 and by Dr. Frevert in February 1999, instability was noted. Nevertheless, claimant denies any subsequent injury to her shoulder.

5. Claimant admits to having worked as a bartender since the alleged accident date. Also, a videotape taken July 17, 1998, shows a woman, presumably claimant, playing air hockey. Claimant did not deny being able to play air hockey but it appears inconsistent with claimant's description of her injury.

Conclusions of Law

The Appeals Board has jurisdiction to consider the issues of whether there was a new accidental injury and whether the condition for which claimant is seeking benefits arose out of and in the course of her employment with respondent. K.S.A. 44-534a(a)(2).

Dr. Prostic is the only physician who has addressed the question of whether claimant has sustained a new injury or whether instead her present symptoms are the direct and natural result of her prior automobile accident. He describes claimant's condition as a work-related aggravation of preexisting disease. Claimant attributes her condition solely to the work she was performing with respondent. At the preliminary hearing claimant testified that her symptoms are different than they were back in April of 1997. Claimant also testified that she has never before had problems in the area of her right shoulder where she is currently having the work-related pain.

Generally, workers compensation laws require an employer to compensate an employee for personal injury or aggravation of a preexisting injury incurred through accident arising out of and in the course of employment. K.S.A. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

Claimant is seeking preliminary hearing benefits for a series of aggravations that occurred between October 24, 1997 and December 1997. The question of whether the aggravation of claimant's condition is compensable turns on whether the aggravations stemmed from claimant's work-related activity and a new accidental injury with this respondent. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). Based upon the evidence presented, the Appeals Board finds that it did.

Claimant described a specific traumatic event occurring on October 24, 1997. "I was packing bags, and I felt a pop in my shoulder in the front area, felt like it was dislocated and it was a burning sensation, and then they sent me to the doctor, OccuMed." Prel. H. Tr. at 7.

Thereafter, her condition worsened. Although the evidence suggests a continued worsening even after claimant left her job with respondent, there is no evidence of a new accident or specific trauma. Also, there is no expert medical opinion relating claimant's current condition or need for surgery to her employment as a bartender or any other activities claimant has performed since December 1997. The Board concludes, therefore, that any worsening of claimant's condition after she left work for respondent was the direct and natural consequence of her work-related injury.

Respondent next argues that the evidence does not establish the claimant is in need of additional medical treatment, specifically surgery, for her alleged work-related injury. The Board's jurisdiction is limited to a review of allegations that the administrative law judge exceeded his or her jurisdiction. K.S.A. 44-551. This includes jurisdictional issues listed in K.S.A. 44-534a. Whether claimant is or is not in need of medical treatment is an issue clearly within the jurisdiction of the Administrative Law Judge. His decision on that question will, therefore, not be reviewed in an appeal from a preliminary hearing order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on May 20, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Clifford K. Stubbs, Lenexa, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director